25405

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 249.

WILLIAM H. CARSON, PLAINTIFF IN ERROR,

vs.

THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, PLYMOUTH COUNTY, MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED APRIL 11, 1900.

(17,713.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1900.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the justices of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between William H. Carson, of Brockton, in the county of Plymouth, in the said Commonwealth, petitioner, and The Sewerage Commissioners of the City of Brockton, of said Brockton, in said county of Plymouth, respondents, upon a petition for a writ of certiorari, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said petitioner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the fifth day of March, in the year of our Lord one thousand nine hundred.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
OLIVER WENDELL HOLMES,
Chief Justice Supreme Judicial Court.

1—249

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

And now here the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court within and for said county of Suffolk, have hereto set my hand and the seal of said court this twenty-first day of March, [SEAL.] A. D. nineteen hundred.

JOHN NOBLE, *Clerk.*

3 & 4 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our supreme judicial court, holden at Boston, within and for said county of Suffolk, from the first day of January, in the year of our Lord one thousand nine hundred, to the first day of January, A. D. 1901, it is thus contained, the following being the entire record in the case:

5 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

WILLIAM H. CARSON, Petitioner for Certiorari,
v.
THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, Respondents.

Petition.

To the honorable the justices of the supreme judicial court within and for the county of Suffolk:

Respectfully represents William H. Carson of Brockton in our county of Plymouth, that he is a citizen and a tax-payer of said Brockton, and was on May 1, 1898, and still is, seised and possessed of a certain parcel of land situated in said Brockton, and more particularly described in Schedule A, hereto annexed; that on August 23, 1894, the common council of said city of Brockton did pass an ordinance in relation to sewerage and sewerage assessments of said city of Brockton, which was passed to be ordained in concur-
6 rence by the board of aldermen of said city of Brockton, August 27, 1894, and approved September 4, 1894, by John J. Whipple, mayor of said city of Brockton, as follows:

"*An Ordinance in Relation to Sewerage and Sewerage Assessments.*

"Be it ordained by the city council of the city of Brockton, as follows:

"SECTION 1. The sewerage construction commissioners, shall have the direction and control, subject to orders of the board of aldermen, of all the common sewers of the city and of the construction, maintenance, repair and use of the same and may make such rules and regulations relating thereto as they shall judge expedient, subject to the approval of the board of aldermen. The city engineer under the direction of said commissioners, shall have the general supervision and inspection of the construction and maintenance of all common sewers built or owned by the city and of all connections of particular sewers built under the provisions of section 4 of chapter 245 of the Acts of 1892. He shall make and prepare all plans and needed specifications designed to govern the work of construction; when the sewers are to be constructed, he shall cause accurate plans thereof to be made, representing the location, depth, and material, with a section plan of each sewer indicating the size, shape, thickness and construction. and he shall cause to be shown upon said plan all existing connections of said sewers, and all public connections as they are made.

"SECTION 2. One-half of the whole cost of the sewerage system, estimated at $1,300,000.00, including the cost of laying, making and maintaining its common sewers, shall be paid by equitable annual charges or rents for the use of such sewers by the persons who enter the same, and one-fourth part of such whole cost shall be paid from assessments upon estates receiving benefit according to the frontage of such estates on any street or way when a sewer shall be constructed and according to the area of such estates within a fixed depth as hereinafter prescribed, and the remainder shall be paid by the city and raised by general taxation: all of said assessments, charges and rents to be made, certified and collected as hereinafter prescribed.

"SECTION 3. An assessment shall be made upon the owners of abutting estates, by a fixed uniform rate based upon the estimated cost of the entire system, of fifteen cents ($0.15) a linear foot of frontage of such estates on any street or way where a sewer is constructed, and of three mills (0.003) a square foot, according to the area of such estates within a fixed depth of 125 feet from such street or way; but no area shall be assessed more than once.

"No assessment in respect to any such estate which, by reason of its grade or level, or for any other cause, cannot be drained
7 into such sewer shall be made, certified, or notified until such incapacity is removed. When such estates abut upon more than one such street or way, such assessment shall be made upon the whole of the longest frontage, and sixty feet of the frontage upon each other such street or way shall be exempted from such assessment, but all in excess of said sixty feet exempted shall be subject to assessment.

"In making such assessment the frontage shall be assessed to the nearest foot and the areas shall be determined from the plans on file at the assessor's office.

"The sewerage construction commissioners shall direct the city engineer to prepare and submit plans to the board of aldermen, showing the estates to be assessed, giving the owners' names, frontages and areas, together with a schedule showing the assessments on the estates abutting and benefited. The amount assessed and certified by the mayor on behalf of said board shall be entered upon the plans prepared for assessment, and shall, for two years after they are laid, constitute a lien on the real estate assessed, and shall, together with all incidental costs and expenses, be levied by sale of such real estate, if the assessment is not paid within three months after a written demand for payment, made upon the person assessed, or upon the person occupying the estate; such sale to be conducted in like manner as sales for the payment of taxes.

"Owners of estates or parts of estates not liable to assessment as aforesaid, or not in fact assessed, shall pay for special benefits to such estates such reasonable sums as the mayor and aldermen shall determine.

"The collector of taxes upon receipt of the schedule of assessment certified by the mayor, shall forthwith render notice of assessment and amounts of the same to the parties assessed therein, and the said amount shall be due and payable thirty days from the date of such notice, after which time interest will be charged thereon at the rate of six per cent. per annum.

"SECTION 4. Every person or owner of an estate who enters his particular sewer into a common sewer, shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: for unmetered water service, eight dollars; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than eight dollars, it being provided however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or
8 owner may place at his own expense a water meter which shall be approved by the said commissioners to measure the amount of water which does not enter the sewer.

"Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the city of Brockton.

"SECTION 5. The city council shall appropriate annually to be raised by taxation, a sum not less than one-fourth nor more than two-thirds of the annual sewerage expenses, including instalments, interest on bonds and maintenance, sufficient to meet all deficiencies in the preceding year.

"SECTION 6. Whenever any street is opened for the laying of pipes

for water, gas, or other purposes, or for the prosecution of any works of construction, such laying of pipes and the work connected therewith, or such work of construction, shall be so executed as not to obstruct in any way the course, capacity or construction of a common sewer; and whenever pipes for any purpose or any work of construction are found to exist at such depth, or in such location as to interfere with any existing sewer, or with the building of any common sewer of the required size, and at the proper depth and grades, the department, corporation, or person maintaining the same shall, upon notice thereof, at once remove, change, or alter said pipe or pipes, or other works, in such manner as the sewerage construction commissioners may direct. If such department, corporation, or person, negiects to comply immediately with the the terms of such notification, the sewerage construction commissioners may make such removal, change or alteration, and the cost thereof shall be paid by such department, corporation or person.

"SECTION 7. All applications for the construction of particular sewers and their entrances into common sewers, and for permits to enter the same shall be in such form as the sewerage construction commissioners shall prescribe, and be filed with the city engineer. All such particular sewers, and their entrances into common sewers, shall be constructed, maintained and kept in proper repair by the sewerage construction commissioners, and shall be the property of the city; and the cost thereof shall be paid by the owners of the estates connecting, before the same are used or house connections made therewith; the cost of all repairs made thereon shall be paid by the owners of estates connecting.

"SECTION 8. No person shall enter or attempt to enter a private drain or sewer into a common sewer or its connections, or into the underdrain constructed in connection therewith, except he is duly licensed thereto, and no person shall cut into, interfere with, or obstruct a common sewer.

9 "SECTION 9. No person shall throw or discharge into a public sewer or any of its connections, any steam or any other matter or thing which may tend to, or cause, an obstruction thereof, or a deposit therein or any injury thereto.

"SECTION 10. Any person violating any of the provisions of this ordinance shall be punished by a fine not exceeding twenty dollars for each offence.

"IN COMMON COUNCIL, *Aug.* 23, 1894.

"Passed to be ordained and sent up for concurrence.

"CHARLES WILLIAMSON, *President.*

"IN BOARD OF ALDERMEN, *August* 27, 1894.

"Passed to be ordained in concurrence.

"C. C. CROOKER, *President.*

"Approved Sept. 4, 1894.

"JOHN J. WHIPPLE, *Mayor.*

"A true copy.

"Attest: DE WITTLE PACKARD, *City Clerk.*"

[CITY SEAL.]

That, in accordance with said ordinance of the said city of Brockton, the sewerage commissioners of said city added to the taxes assessed on the petitioner's land a separate tax or rental charge amounting to $42.53, for the maintenance and operation of the sewerage works of said city, and made demand upon the petitioner July 1, 1899, for the above-mentioned sum of $42.53, as a rental charge or assessment for the use of said sewer, by sending a tax bill for the aforesaid amount, which tax bill is hereto annexed marked B.

And your petitioner alleges that said tax or sewerage rental charge of the board of sewerage commissioners made under the power derived from said ordinance of the city of Brockton, with the approval by the mayor of said city, charging the estate of your petitioner with the sum of $42.53 as aforesaid, is illegal and void, for the following reasons:

1. Because said ordinance, under which said tax or sewerage rental was made, does not provide for either notice or hearing of persons whose estates are affected thereby, which is contrary to and in violation of articles 10, 11, 12, 15, of part I of the constitution of Massachusetts.

2. Because the method of computing said sewer charges, which your petitioner was informed was adopted by said sewerage commissioners, to wit, "For unmetered water service $8. For metered water service thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter, readings taken by the water commissioners, but the annual charge shall in no case be less than $8," is unreasonable and disproportionate, and in violation of section 4 of chapter I, part II, of the constitution of Massachusetts.

3. Because your petitioner, having already paid for the sewers connected with his land, cannot be compelled to pay a special tax or rental for the maintenance and operation of sewers from which he receives no special benefit.

4. Because said tax or sewer rental, and the ordinance authorizing the same, is in violation of the provisions of section 1 of the fourteenth amendment of the Constitution of the United States, and is therefore illegal and void.

5. Because said tax or sewerage charge is permissible under the constitution of this Commonwealth, or under the Constitution of the United States, only when founded upon special and peculiar benefits to the property so taxed, and then only to the amounts of such special and peculiar benefits.

6. Because, where lands have been assessed for special benefits from the construction of sewers by whose operation they are effected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of said sewers such as to subject them to a special tax or charge, for the reason that expenses of this kind should be made subject of general taxation.

Wherefore your petitioner prays for a writ of certiorari, to be directed to the Board of Sewerage Commissioners of the City of Brockton, directing them to bring up before your honors the several proceedings aforesaid; that said proceedings as to said assessment may

be quashed, and that your petitioner may have such other relief, including costs, as he may be entitled to in the premises.

WILLIAM H. CARSON,
Attorney pro Se.

Filed July 26, 1899.

SCHEDULE A.

Schedule of Property Belonging to William H. Carson.

1. Wooden building and land 350 Main street, Brockton.
2. House and land 6 Allen street, in said Brockton.
3. House and land 8 Allen street, in said Brockton.

11 & 12 EXHIBIT B.

[SEAL.] Office of city treasurer, city hall.

BROCKTON, *Jul-* 1, 1899.

You are hereby notified that your bill for sewer rent, amount $42.53, is now due. All bills are to be paid at city hall, on or before Jul- 10, 1899. Open daily from 9 to 12 a. m. and 1.30 to 5 p. m.

W. H. EMERSON,
City Treasurer.

Extract from Ordinances.—"SECTION 4. Every person or owner of an estate who enters his particular sewer into a common sewer, shall pay for the use of such sewer an annual rental determined upon the basis of water service, as follows: For unmetered water service, eight dollars; for metered water service, thirty cents per 1,000 gallons of sewerage delivered to the sewer, the quantity so delivered to be determined by the meter readings taken by the water commissioners, but the annual charge shall in no case be less than eight dollars, it being provided however, that in cases where said commissioners shall deem the same to be equitable, a discount may be made, such discount to be determined by said commissioners and approved by the mayor and aldermen; and it being further provided that any such person or owner may place at his own expense a water meter which shall be approved by the said commissioners, to measure the amount of water which does not enter the sewer.

Such charges shall be collected quarterly and shall constitute a lien upon the real estate using the sewer, to be collected in the same manner as taxes upon real estate, or in an action of contract in the name of the city of Brockton.

WILLIAM H. CARSON,
Attorney pro Se.

(Printed at side:) Please bring this postal when you call to pay the bill.

13 & 14 This petition was entered in our said court on the twenty-sixth day of July, A. D. eighteen hundred and ninety-nine, and upon said petition it was ordered as follows, to wit:

15-17 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Supreme Judicial Court.

On the foregoing petition it is ordered that the petitioner give notice to the said Sewerage Commissioners of the City of Brockton to appear before the justices of this court, to be holden at Boston, within and for said county of Suffolk, on the second Tuesday of August, next, to wit, August 8th, at 9½ o'cl'k a. m., by serving them with an attested copy of said petition and of this order thereon forthwith, that they may then and there show cause why the prayer of said petition should not be granted.

By the court:

JOHN NOBLE, *Clerk.*

July 26, 1899.

18 [Endorsed:] No. 6635. Wm. H. Carson, pet'r for certiorari, *vs.* Sewerage Com'rs of the City of Brockton. Filed ——. —— ——, clerk.

19 & 20 And return of service was made upon said petition by the officer serving the same in the words and figures following, to wit:

21 & 22 PLYMOUTH, *ss*:

BROCKTON, *July* 29, 1899.

By virtue hereof I, on the twenty-seventh day of July, instant, served upon the within-named Sewerage Commissioners of the City of Brockton a true and attested copy of this petition and of this order thereon by giving the same in hand to Walter F. Cleaveland, one of the said commissioners and superintendent thereof.

GEORGE A. WHEELER,
Deputy Sheriff.

Fees.

Service	$ .50
Copy	2.00
Travel	2.00
	$4.50

23 & 24 And afterwards, to wit, on the eighth day of August, in said year, said respondents appearing by F. M. Bixby, Esquire, its attorney, filed their demurrer as follows, to wit:

25 *Demurrer.*

And now come W. F. Cleaveland, A. C. Thompson, and F. Herbert Snow, sewerage commissioners of the city of Brockton, respondents, and demur to the petitioner's bill, and say that said bill and matters therein contained, in manner and form as the same are

stated and set forth, are not sufficient in law for the petitioner
26 to have his writ against the respondents; for that it does not from said petition show that the proceedings against him were unjust, unlawful, unconstitutional, or beyond the power of said defendants.

Wherefore they pray that said petition be dismissed.

By their attorney, F. M. BIXBY.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended merely for delay.

F. M. BIXBY.

Filed August 8, 1899.

27 & 28 Whereupon a hearing was had, and the questions of law arising thereon were reserved by the justice who presided at the hearing for the determination of the full court, under the provisions of chapter 186, section 8, of the Public Statutes, in the words following, to wit:

29 & 30 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County. Common Law.

WILLIAM H. CARSON, Petitioner for Certiorari,
v.
THE SEWERAGE COMMISSIONERS OF THE CITY OF BROCKTON, Respondents.

Reservation.

This cause came on to be heard upon the petition and the demurrer thereto, and the petitioner disclaiming any wish to amend his petition, and the respondents disclaiming any wish to set up any defence other than their demurrer, at the request of the parties the cause is reserved for the determination of the full court upon the petition and demurrer, such order to be made as law and justice may require.

JAMES M. BARKER, *J. S. J. C.*

31 & 32 And afterwards, to wit, on the thirtieth day of January, A. D. one thousand nine hundred, the parties appeared, and it was ordered by the said supreme judicial court for the Commonwealth by its rescript as follows, to wit:

33–35 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth.

AT BOSTON, *January*, 1900.

In the case of William H. Carson, petitioner for certiorari, *vs.* The Sewerage Commissioners of the City of Brockton, respondents, pending in the supreme judicial court for the county of Suffolk:

Ordered that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Petition denied.

By the court:

HENRY A. CLAPP, *Clerk.*

January 30, 1900.

36 [Endorsed:] 6635. No. 1473. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. William H. Carson, petn., *vs.* Sewerage Com'rs of Brockton.

37 & 38 And it was thereupon ordered by said supreme judicial court within and for the county of Suffolk accordingly.

39 & 40 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

[SEAL.] Witness Oliver Wendell Holmes, chief justice of our said supreme judicial court, at Boston, in said county of Suffolk, this 21st day of March, in the year of our Lord nineteen hundred.

JOHN NOBLE, *Clerk.*

41 In the Supreme Court of the United States.

Between—

WILLIAM H. CARSON, Plaintiff in Error,
and
BROCKTON SEWERAGE COMMISSIONERS, Defendants in Error.

Assignment of Errors.

And the said William H. Carson says that in the record and proceedings aforesaid and in making the decree aforesaid there is manifest error in this, to wit:

(1.) That by the record aforesaid it appears that it was decided in and by the said decree that the ordinance in relation to sewerage and sewerage assessments for the city of Brockton, in the county of Plymouth, Commonwealth of Massachusetts, which aforesaid ordinance was passed by the common council of said city of Brockton August 23rd, 1894, to be ordained in concurrence by the board of aldermen of the said city of Brockton, and was approved September 4th, 1894, by John J. Whipple, mayor of the said city of Brockton, said ordinance being passed by the power derived from the Statutes of 1892, chapter 254, and chapter 50 of the Public Statutes of the aforesaid Commonwealth, were valid and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid ordinance and the statutes aforesaid were repugnant to the provisions of the said Constitution that no State shall deprive any person of property without due process of law.

42 (2.) That by the aforesaid record it appears that it was decided in and by the said decree that the charges set forth in section 4 of the said ordinance, to wit, for unmetered water service, eight dollars ($8); for metered water service, thirty cents (30c.) per thousand gallons of sewerage delivered to the sewer, came within the meaning of the statutes as equitable and just, and not repugnant to the Constitution of the United States, whereas it ought to have been decided that the aforesaid charges for delivering the sewerage to the sewer were unjust and inequitable, invalid, and repugnant to the Constitution of the United States for the reason that such charges in and of themselves amounted to the taking or destruction of the property of the petitioner.

(3.) There is also manifest error in this, to wit, that by the record aforesaid it appears that the prayer of the petitioner therein mentioned for the writ of cert-orari was denied by the said decree, whereas a writ of cert-orari ought to have been thereby granted, as in the said petition prayed.

And the said William H. Carson prays that the said decree for the errors aforesaid, and others in the record, may be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he hath lost by the occasion of said decree.

WILLIAM H. CARSON,
Plaintiff in Error, pro Se.

43 [Endorsed:] William H. Carson, plaintiff in error, and Brockton Sewerage Commissioners, defendants in error. Assignment of errors.

44 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *March* 6, 1900.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of William H. Carson, pet., *vs.* Sewerage Comm'rs of Brockton, decided on the 30th day of January, 1900.

GEO. F. TUCKER,
Reporter of Decisions.

45 & 46 HOLMES, *C. J.*:

This is a petition for a writ of certiorari for the purpose of quashing the assessment of an annual charge for the use of a common sewer. The assessment was authorized by St. 1892, c. 245, § 1, and by an ordinance in pursuance of that section. It is objected that both statute and ordinance are unconstitutional.

By the statute the city council of any city, except Boston, or a town with sewers laid out under Pub. Sts., c. 50, §§ 1–3, or with a system of sewerage under § 7, may establish just and equitable annual charges or rents for the use of such sewers to be paid by every one who enters his sewer into the common sewer. The ordinance charges for "unmetered" water service eight dollars and for "metered" water service thirty cents per thousand gallons of sewerage delivered to the sewer, but no charge to be less than eight

dollars, subject to certain possible discounts. It is argued
47 & 48 that the statute is subject to the objections which prevailed in Sears *v.* Street Commissioners, 53 N. E. Rep., 876, that the charge is a tax which properly should be borne by the public generally, and that there are no provisions for a hearing.

We are of opinion that the petitioner received a special benefit for which he might be charged, and that this case is free from the elements which in Sears *v.* Street Commissioners led to the conclusion that the petitioner was assessed without regard to the benefits received by him. No one denies that it was a special benefit to the petitioner to have the sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future; but the city by building it and receiving a part of the cost from the petitioner did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it.

The charge allowed by the act is a charge for using the sewer, a benefit distinct from that originally conferred by building it.
49 & 50 By the statute the charge must be a "just and equitable" charge. These words have been held insufficient to save the constitutionality of a statute in State *v.* Commissioners of Streets & Sewers, 9 Vroom, 190, and in Barnes *v.* Dyer, 56 Vt., 469. But the facts of those cases were too different to make them conclusive. Here the words are applied solely to those who actually use the sewer. Therefore the benefit to the parties assessed is established. The assessment in order to be equitable must be proportional to the benefit and not in excess of it. The words, in this connection, sufficiently express an intent to confine the charge within constitutional limits. They are so construed by the ordinance, for by the ordinance the charge is in proportion to the extent of the use, which is a reasonable way of estimating the extent of the benefit received. See Parker *v.* Boston, 1 Allen, 361, 367. There is no charge unless the sewer is used. The charge to the plaintiff was forty-two dollars and fifty-three cents, and therefore, under the terms of the ordinance which we have stated, must have been determined by metre.

It is said that there is no provision for a hearing. But under the ordinance the only questions are whether the petitioner's sewer enters the common sewer and what amount of sewage is shown by the metre readings to have been delivered to the sewer. If
51 & 52 the petitioner wished to be heard on either of these facts no doubt he could resort to the courts. On the rate per thousand gallons fixed by the ordinance he was not entitled to be heard. So far as appears, if he is dissatisfied with the rate, he is not obliged to use the sewer; but if he were compelled by law to use it and to pay, as now, for the use (St. 1890, c. 132), and recognizing, as we must, the possibility that, in spite of the meaning which we attribute to the statute, the rate fixed by the ordinance might be in excess of the benefit received, still, in our opinion, the act and ordi

nance would be valid, notwithstanding that mere possibility, in the absence of any allegation that the rate fixed did exceed in fact the benefit received. In cases of this sort the petitioner has no right of appeal to a jury. Howe *v.* Cambridge, 114 Mass., 388. The final decision must be somewhere, and may as well be left to the city council as to any one. New London Northern Railroad *v.* Boston & Albany Railroad, 102 Mass., 386, 387, 388. If it is left to them they are not obliged to hear the several parties who may be affected before fixing a general rate. Clearly, the rate might have been fixed by the legislature without a hearing. Parsons *v.* District of Columbia, 170 U. S., 44. And whatever differences there may be between the legislature of the State and inferior, although legislative, bodies
53–55 in cases where particular property is to be valued, still, when a uniform and self-adjusting rate is adopted under which no question as to proportion can arise, or any other question except the general one whether the rate is high, we are of opinion that the legislature has power to authorize a city council to determine that question, as it has done here. United States *v.* New Orleans, 98 U. S., 381; Railroad Commission case, 116 U. S., 307; Spencer *v.* Merchant, 125 U. S., 345, 356; Chicago, Milwaukee & St. Paul Railway *v.* Minnesota, 134 U. S., 418, 459; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 394. See further Leominster *v.* Conant, 139 Mass., 384.

If under the pretence of fixing an equitable rate the ordinance should do what amounted to the taking or destruction of property, very possibly that might afford a ground for judicial interference as in other cases where the legislature fixes rates. Smyth *v.* Ames, 169 U. S., 466; St. Louis & San Francisco Railway *v.* Gill, 156 U. S., 649; Chicago, Milwaukee & St. Paul Railway *v.* Minnesota, 134 U. S., 418. See Parker *v.* Boston, 1 Allen, 361.

Petition denied.

56 [Endorsed:] William H. Carson, pet., *vs.* Sewerage Com'rs of Brockton. Certified copy of the opinion of the supreme judicial court.

57 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Sewerage Commissioners of the City of Brockton, in our county of Plymouth, in the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, on the * first Monday of April next, pursuant to a writ of error filed in the clerk's office of the † supreme judicial court of Massachusetts for the county of Suffolk, wherein William H. Carson, of said Brockton, in the county of Plymouth, in the said Commonwealth, is plaintiff in error and you are defendants in error, to show cause, if any there

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oliver Wendell Holmes, chief justice of the supreme judicial court of Massachusetts, this fifth day [SEAL.] of March, in the year of our Lord one thousand nine hundred.

OLIVER WENDELL HOLMES.

58 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

PLYMOUTH, ss: *M'ch* 17, 1900.

I hereby certify that on the seventeenth day of March, 1900, I served the within citation by delivering to Walter F. Cleavland and leaving at the last and usual place of abode of A. C. Thompson and Frank H. Snow true and attested copies of this citation, they being the sewerage commissioners of Brockton.

HENRY S. PORTER,
Deputy Sheriff.

59 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Supreme Judicial Court.

I, John Noble, clerk of the supreme judicial court within and for the said county of Suffolk, hereby certify that the foregoing are true copies of—

I. The record in the case of William H. Carson, petitioner for certiorari, *v.* The Sewerage Commissioners of the City of Brockton, respondents, in said supreme judicial court determined, and annexed to and transmitted with said record.

II. The assignment of errors.

III. Copy of the opinion of the full court and of all the proceedings in said case, with all things concerning the same, together
60 with—

IV. The original citation.

V. The acknowledgment of service thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said court this twenty-first day of March, in the year of our Lord one thousand nine hundred.

[SEAL.] JOHN NOBLE, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Mar. 21, 1900. J. N.]

61 *Bond on Writ of Error.*

United States Circuit Court of Appeals for the First Circuit.

Blank No. 4.

Know all men by these presents that we, William H. Carson, of Brockton, in the county of Plymouth and Commonwealth of Massa-

chusetts, as principal, and Mary B. C. Carson, of said Brockton, as sureties, are held and firmly bound unto the Sewerage Commissioners of the City of Brockton, of said Brockton, in said county of Plymouth, in the full and just sum of five hundred dollars ($500.00), to be paid to the said Sewerage Commissioners of the City of Brockton, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of March, in the year of our Lord one thousand nine hundred.

Whereas lately, at a sitting of the supreme judicial court of Massachusetts for the county of Suffolk upon a petition depending in said court between the said William H. Carson, as petitioner, and the said Sewerage Commissioners of the said City of Brockton, as respondents, judgment was rendered against the said William H. Carson, and the said William H. Carson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sewerage Commissioners of the City of Brockton, citing and admonishing them to be and appear in the Supreme Court of the United States, in the city of Washington, on the first Monday of April next:

Now, the condition of the above obligation is such that if the said William H. Carson shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. CARSON. [SEAL.]
MARY B. C. CARSON. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—
——— ———.

Approved:
O. W. HOLMES, *J. S. J. C.*

Copy.
Attest: JOHN NOBLE, *Clerk.*

Endorsed on cover: File No., 17,713. Massachusetts supreme judicial court. Term No., 249. William H. Carson, plaintiff in error, *vs.* The Sewerage Commissioners of the City of Brockton, Plymouth county, Massachusetts. Filed April 11th, 1900.